**SOUTH TYNESIDE COUNCIL**

|  |
| --- |
| **waste materials streams and additional waste services DYNAMIC PURCHASING SYSTEM Agreement** |

**CONTENTS**

[1 INTERPRETATION](#Interpretation)

[2 TERM OF DYNAMIC PURCHASING SYSTEM AGREEMENT](#Termofframework)

[3 SCOPE OF DYNAMIC PURCHASING SYSTEM AGREEMENT](#SCOPEOFFRAMEWORK)

[4 SUPPLIER APPOINTMENT](#PROVIDERSAPPOINTMENT)

[5 NON-EXCLUSIVITY](#NONEXCLUSIVITY)

[6 AWARD PROCEDURES](#AWARDPROCEDURES)

[7 CALL-OFF CONTRACT PERFORMANCE](#CALLOFFCONTRACT)

[8 TERMINATION](#TERMINATION) BY THE COUNCIL

[9 CONSEQUENCES OF TERMINATION AND EXPIRY](#CONSEQUENCESOFTERMINATION)

[10 TRANSFER AND SUB-CONTRACTING](#TRANSFER)

11 DATA PROTECTION

12 FREEDOM OF INFORMATION

13 TUPE AND RE-TENDERING

[14 VARIATIONS TO THE DYNAMIC PURCHASING SYSTEM AGREEMENT](#VARIATIONS)

[15 LAW AND JURISDICTION](#LAWANDJURISDICTION)

16 THIRD PARTY RIGHTS

17 ENTIRE AGREEMENT

[SCHEDULE 1](#SCHEDULE1) CALL-OFF TERMS AND CONDITIONS

**BACKGROUND**

1 The Council has sought expressions of interest from Applicants for the provision of Services under a Dynamic Purchasing System (“DPS”) arrangement.

2 This DPS Agreement sets out the award and ordering procedure for Services that may be required by the Council. There will be no obligation for the Council to place any Order or Orders under this DPS Agreement during its Term.

**IT IS AGREED** as follows:-

1. **INTERPRETATION**

1.1 Unless the context otherwise requires, the following words and expressions shall have the following meanings:-

|  |  |  |
| --- | --- | --- |
| **“Authorised Officer”** | The person duly appointed by the Council and notified in writing to the Supplier to act as the representative of the Council for the purpose of the DPS Agreement in the Contract Particulars or as amended from time to time and in default of such notification the Council’s Head of Service for Procurement or similar responsible officer. | |
| “**Award Criteria**” | Means the award criteria as set out in the Mini Invitation to Tender; | |
| "**Call-Off Contract**" | means the legally binding agreement (made pursuant to the provisions of the DPS Agreement) for the provision of Services made between Council and the Supplier comprising:  (i) the Order Form;  (ii) the Contract Particulars;  (iii) the DPS Agreement Terms and Conditions;  (iv) the Call-Off Terms and Conditions;  (v) any Special Terms and Conditions;  (vi) the Tender; and  (vii) any relevant pre tender or/and post tender clarifications | |
| "**Call-Off Terms and Conditions**" | means the terms and conditions, including any Special Terms and Conditions, contained within Schedule 1; | |
| "**Commencement Date**" | means the date set out in the Contract Particulars; | |
| **“ Supplier(s)”** | | means the supplier(s) who has/have been appointed under the DPS and where applicable this shall include the supplier’s Employees, sub-contractors, agents, representatives, and permitted assigns and, if the supplier’s is a consortium or consortium leader, the consortium members; |
| **“Contract Particulars”** | means the document detailing the specific core terms of the DPS Agreement which shall include but not be limited to the, Commencement Date, Term, Authorised Officer, Contract Manager, Key Personnel, and the Specification. | |
|  |  | |
| **“Council”** | means the Council of the Borough of South Tyneside; | |
| **“EIR”** | The Environmental Information Regulations 2004 as amended. | |
| **“FOIA”** | The Freedom of Information Act 2000 as amended. | |
| **“Dynamic Purchasing System (DPS)”** | Means the overarching arrangement whereby the Council seeks to appoint the Supplier as a potential supplier of the Services as described in the Instructions. | |
| "**DPS Agreement**" | Means the agreement between the Council and the Supplier which sets out the terms governing contracts to be awarded during the Term and which incorporates:  the DPS Terms and Conditions;  any Special Terms and Conditions; the Instructions; and  the Contract Particulars; | |
| **“DPS Terms and Conditions”** | Means the terms and conditions set out in this agreement and the Schedule to this agreement; | |
|  |  | |
| "**Guidance**" | means any guidance issued or updated by the UK Government from time to time in relation to the Regulations; | |
| **“Instructions”** | means the document entitled “How to join the South Tyneside Council Waste Material Streams and additional Waste Services Dynamic Purchasing System and how it operates”, including all the Schedules thereto; | |
| "**Law**" | means any applicable Act of Parliament, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, exercise of the royal prerogative, enforceable community right within the meaning of Section 2 of the European Communities Act 1972, regulatory policy, guidance or industry code, judgment of a relevant court of law, or directives or requirements of any Regulatory Body; | |
| **“Category”**  **“Liabilities”**  **“Mini Invitation to Tender”** | means a category of Service for which economic operators may apply separately, without necessarily having to apply to provide the entirety of the Services to be supplied under the DPS Agreement. Details of the Categories (if applicable) are set out in the Instructions;  all costs, actions, demands, expenses, losses, damages, claims, proceedings, awards, fines, orders and other liabilities (including reasonable legal and other professional fees and expenses) whenever arising or brought.  comprising of but not limited to; Contract Particulars, Call Off Terms and Conditions, Instructions, Award Criteria, Specification, Pricing Schedule, Form of Tender and Non Collusion Certificate. | |
|  |  | |
| "**Order**" | means an order for Services served by the Council on a Supplier in accordance with the Ordering Procedures; | |
| **"Order Form"** | means a document setting out details of an Order in a form to be specified by the Council; | |
| "**Ordering Procedures**" | means the ordering and award procedures specified in Clause 6; | |
| "**Party**" | means the Council and the Supplier; | |
| **“Prohibited Act”** | include any of the following (i) termination of employment; (ii) or the alteration or change of terms and conditions of any Employees; (iii) or the recruitment of any employees; or (v) relocation or assignment to new duties of any employees. | |
| **“Regulations”**  **“Replacement Supplier”** | the Public Contracts Regulations 2015 as amended.  any company, organisation or person who replaces the Supplier following termination or expiry of all or part of this call-off contract. | |
| “**Services**” | means the services described in the Specification to be supplied by the Supplier in accordance with the DPS Agreement; | |
| **“Special Terms and Conditions”**  **“Specification”** | any additional terms and conditions attached which were set out in the Instructions;  as detailed in the Contract Particulars. | |
|  |  | |
| "**Term**"  **“Transferring Employees”**  **“TUPE”** | means the period as shown in the Contract Particulars, including any period of extension or on earlier termination of this DPS Agreement.  those employees employed wholly or mainly by the Supplier in providing the Services and who will transfer to a Replacement Supplier or the Council (as the case may be) under the provisions of TUPE.  The Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended. | |

1.2 The interpretation and construction of this DPS Agreement shall be subject to the following provisions:-

1.2.1 words importing the singular meaning include where the context so admits the plural meaning and vice versa;

1.2.2 words importing the masculine include the feminine and the neuter;

1.2.3 the words “include”, “includes” and “including” are to be construed as if they were immediately followed by the words “without limitation”;

1.2.4 references to any person shall include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assigns or transferees;

1.2.5 references to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted;

1.2.6 headings are included in this DPS Agreement for ease of reference only and shall not affect the interpretation or construction of this DPS Agreement;

1.2.7 in the event and to the extent only of any conflict between the provisions of the Call-Off Terms and Conditions, Special Terms and Conditions and the DPS Agreement then, the application of the Clauses shall prevail in the following order:

i. Special Terms and Conditions

ii. Call-Off Terms and Conditions

iii. DPS Agreement

**2. Term of DPS Agreement**

2.1 The DPS Agreement shall take effect on the Commencement Date and (unless it is otherwise terminated in accordance with the terms of this DPS Agreement or it is otherwise lawfully terminated) shall terminate at the end of the Term.

2.2 If the Contract Particulars includes an option to extend the DPS Agreement and the Council intends to take up the option, the Supplier shall be notified in writing within the period stated in the Contract Particulars prior to the commencement of the extension. If no such notification is issued the DPS Agreement shall automatically expire after the initial Contract Period.

2.3 Clause 2.1 and 2.2 shall not apply to any Call-Off Contract made under this DPS Agreement which is due to expire after the end of the Term which shall expire in accordance with the terms of that Call-Off Contract.

**3. SCOPE OF DPS AGREEMENT**

3.1 This DPS Agreement governs the relationship between the Council and the Supplier in respect of the provision of the Services by the Supplier to the Council and where the Services are divided into Categories, this DPS Agreement shall apply to each Category and where the Supplier has been appointed to more than one Category, this DPS Agreement shall apply to each Category.

3.2 The Council may at its absolute discretion and from time to time order Services from the Supplier in accordance with the Ordering Procedure during the Term.

3.3 The Supplier acknowledges that there is no obligation for the Council to purchase any Services from the Supplier during the Term.

3.4 No undertaking or any form of statement, promise, representation or obligation shall be deemed to have been made by the Council in respect of the total quantities or values of the Services to be ordered by it pursuant to this DPS Agreement and the Supplier acknowledges and agrees that it has not entered into this DPS Agreement on the basis of any such undertaking, statement, promise or representation.

**4. SUPPLIER’S APPOINTMENT**

The Council appoints the Supplier as a potential supplier of the Services referred to in the Instructions and the Supplier shall be eligible to be considered for the award of Orders for such Services by the Council during the Term.

**5. NON-EXCLUSIVITY**

The Supplier acknowledges that, in entering this DPS Agreement, no form of exclusivity or volume guarantee has been granted by the Council for Services from the Supplier and that the Council is at all times entitled to enter into other contracts and agreements with other suppliers for the provision of any of the Services.

**6. AwarD PROCEDURE**

**Awards under the DPS Agreement**

**Mini Competition**

6.1 Where there is more than one Supplier appointed under the DPS (or under the relevant Category) and the Instructions so specifies, the Council shall, prior to placing an Order:

6.1.1 identify the Suppliers capable of performing the Call-Off Contract for the Council’s requirements;

6.1.2 supplement and refine the Call-Off Terms and Conditions only to the extent permitted by and in accordance with the requirements of the Regulations and Guidance where applicable;

6.1.3 invite tenders (issuing a Mini Invitation to Tender) by conducting a mini-competition for its requirements in accordance with the Instructions, the Regulations and Guidance and in particular:

(a) confirm prior to the mini-competition whether or not the Council intends to follow this with an electronic auction or use the mini-competition alone. Should this be the case the Council shall provide all Suppliers with full details prior to the e-auction including but not limited to how the e-auction is to be conducted and the outcome of the mini-competition;

(b) consult in writing all the capable of performing the Call-Off Contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded;

(c) set a time limit for the receipt by it of the tenders; and

(d) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders.

6.1.4 apply the Call-Off Award Criteria, including where relevant in any pricing the consideration of any and all additional cost(s) to the Council to the Suppliers’ compliant tenders submitted through the mini-competition as the basis of its decision to award a Call-Off Contract for its requirements.

6.2 The Supplier agrees that all tenders submitted by the Supplier in relation to a mini‑competition held pursuant to Clause 6.1 shall remain open for acceptance for ninety (90) days (or such other period specified in the invitation issued by the Council in accordance with the Ordering Procedure).

6.3 Notwithstanding the fact that the Council has followed the procedure set out above in this Clause 6, the Council shall be entitled at all times to decline to make an award. Nothing in this DPS Agreement shall oblige the Council to place any Order.

**Form of Order**

6.4 Subject to Clause 6, the Council may place an Order with the Supplier by serving an Order Form in writing in such form agreed with the Supplier including systems of ordering involving facsimile, electronic mail or other on-line solutions.

6.5 The Order constitutes an offer by the Council to purchase the Services subject to the Call-Off Terms and Conditions.

**Accepting and Declining Orders**

6.6 Following receipt of an Order, the Supplier shall promptly, and in any event within a reasonable period determined by the Council and notified to the Supplier in writing at the same time as the submission of the Order (which in any event shall not exceed three (3) Working Days), acknowledge receipt of the Order and either:-

6.6.1 notify the Council in writing that it declines to accept the Order; or

6.6.2 notify the Council in writing that it accepts the Order.

6.7 If the Supplier

6.7.1 notifies the Council that it declines to accept an Order; or

6.7.2 the time-limit referred to in Clause 6.6 has expired;

then the offer from the Council to the Supplier shall lapse and the Council may offer that Order to the Supplier that submitted the next most economically advantageous tender in accordance with the relevant Award Criteria or, if there is only one Supplier appointed under the DPS Agreement, or there is no other capable Supplier, the Council may make alternative arrangements for the provision of the Services.

6.8 The Supplier in agreeing to accept such an Order pursuant to Clause6.6above shall enter a Call-Off Contract with the Council for the provision of Services referred to in that Order. A Call-Off Contract shall be formed on the Council’s receipt of the written confirmation of acceptance of the Order provided by the Supplier (or such similar or analogous form agreed with the Supplier) pursuant to Clause 6.6.

**7. CALL-OFF CONTRACT PERFORMANCE**

7.1 The Supplier shall perform all Call-Off Contracts entered into with a Council in accordance with:-

7.1.1 the requirements of this DPS Agreement; and

7.1.2 the Call-Off Terms and Conditions, including any Special Terms and Conditions of the respective Call-Off Contracts.

7.1.3 In the event of, and only to the extent of, any conflict between the terms and conditions of this DPS Agreement, the Call-Off Terms and Conditions, and any Special Terms and Conditions, the application of the Clauses shall prevail in the following order:

1. Special Terms and Conditions
2. Call-Off Terms and Conditions
3. DPS Agreement.

**8. Termination by the council**

8.1 The Council shall have the right to terminate this DPS Agreement, or to terminate the provision of any part of the DPS Agreement at any time by giving one month’s written notice to the Supplier.

8.2 The Council may suspend or terminate the DPS Agreement with immediate effect by notice in writing to the Supplier on or at any time if:

8.2.1 the Supplier becomes bankrupt, insolvent, makes any composition with its creditors, has a receiver appointed under the Mental Health Act 1983 or dies; or

8.2.2 the Supplier is convicted of a criminal offence; or

8.2.3 the Supplier ceases or threatens to cease to carry on its business; or

8.2.4 the Supplier has a change in Control which the Council believes will have a substantial impact on the performance of any Call-Off Contracts; or

8.2.5 there is a risk or a genuine belief that reputational damage to the Council will occur as a result of the DPS Agreement with the Supplier continuing; or

8.2.6 the Supplier is in material or substantial breach of any of its obligations under one or more Call-Off Contracts that is incapable of remedy, or if capable of remedy has not been remedied to the satisfaction of the Council within 14 days, or such other reasonable period as may be specified by the Council after issue of a written notice specifying the breach and requesting it to be remedied; or

8.2.7 the Supplier commits persistent minor breaches under one or more Call-Off Contracts whether remedied or not.

**9. CONSEQUENCES OF TERMINATION AND EXPIRY**

9.1 Notwithstanding the service of a notice to terminate the DPS Agreement under clause 8, the Supplier shall continue to fulfil its obligations under the DPS Agreement until the date of expiry or termination of the DPS Agreement or such other date as required under this Clause 9.

9.2 Termination or expiry of the DPS Agreement shall not cause any Call-Off Contracts to terminate automatically. For the avoidance of doubt, all Call-Off Contracts shall remain in force unless and until they are terminated or expire in accordance with their own terms.

9.3 Termination or expiry of this DPS Agreement shall be without prejudice to any rights, remedies or obligations of either Party accrued under this DPS Agreement prior to termination or expiry.

**10. TRANSFER AND SUB-CONTRACTING**

10.1 The DPS Agreement is personal to the Supplier and the Supplier shall not assign novate or otherwise dispose of the DPS Agreement or any part thereof without the previous consent in writing of the Council. The Supplier shall not be entitled to sub-contract any of its rights or obligations under this DPS Agreement.

10.2 The Council shall be entitled to assign, novate, or otherwise dispose of its rights and obligations under the DPS Agreement or any part thereof to any other body (including any private sector body) which substantially performs any of the functions that previously had been performed by the Council provided that such assignment, novation or disposal shall not increase the burden of the Supplier’s obligations under the DPS Agreement.

**11. DATA PROTECTION**

11.1 The Supplier shall (and shall procure that any of its Employees involved in the provision of the Services) comply with any requirements under any Data Protection legislation.

**12. FREEDOM OF INFORMATION**

12.1 The Council is subject to the FOIA and the EIR (“the Acts”). As part of the Council's duties under the Acts, it may be required to disclose information forming part of the Call-Off Contract to anyone who makes a reasonable request. The Council has absolute discretion to apply or not to apply any exemptions under the Acts.

12.2 The Supplier shall assist and cooperate with the Council (at the Supplier’s expense) to enable the Council to comply with the information disclosure requirements under the Acts and in so doing will comply with any timescale notified to it by the Council.

**13. TUPE AND RE-TENDERING**

13.1 In the event of expiry or termination of this DPS Agreement or whenever reasonably requested by the Council in preparation for re-tendering arrangements the Supplier will provide the Council with such assistance as the Council may require and provide at no cost to the Council any information the Council (whether on its own account or on behalf of any potential or confirmed Replacement Supplier) may request in relation to the Employees. The required information is set out below but is not necessarily restricted to the following:

13.1.1 The total number of Employees whose employment with the Supplier in respect of the Services is likely to be terminated at the expiry of this DPS Agreement but for any operation of the law;

13.1.2 In respect of each Employee their age and gender, details of their salary and payment settlements which relate to future dates but which have already been agreed and their redundancy entitlements (the names of individual employees do not have to be given); and

13.1.3 Full information about the other terms and conditions under which the Employees are employed (including but not limited to their working arrangements) or about where that information can be found; and

13.1.4 Details of pension entitlements, if any; and

13.1.5 Job titles of the Employees affected and the qualifications required for each position; and

13.1.6 Disciplinary procedures taken against any Employees and any grievance procedures taken out by any Employees within the previous two years; and

13.1.7 Details of any court or tribunal case, claim or action brought by any Employees against the Supplier within the previous two years; and

13.1.8 Details of any court or tribunal case claim or action, which the Supplier has reasonable grounds to believe that any of the Employees may bring against the Supplier or a Replacement Supplier arising out of the Employee’s employment.

13.2 The Supplier shall permit the Council to use the information for the purposes of TUPE and for re-tendering. The Council shall be able to disclose this information to any prospective tenderer or Replacement Supplier without requiring the Council to enter in to a confidentiality agreement or otherwise imposing any conditions upon the disclosure of the information. The Supplier will secure all necessary consents from relevant Employees in order to release the information.

13.3 The Supplier will co-operate with the re-tendering of the Service by allowing the Replacement Supplier to communicate with and meet with the Employees and/or their representative(s).

13.4 In the event that the information provided by the Supplier in accordance with Clause 13.1 becomes inaccurate, whether due to changes to the employment and personnel details of the Employees made subsequent to the original provision of such information or by reason of the Supplier becoming aware that the information originally given was inaccurate the Supplier shall notify the Council of the inaccuracies and provide the amended information.

13.5 The Supplier will keep the Council and any Replacement Supplier indemnified in full against all Liabilities arising directly or indirectly and whether incurred by the Council pursuant to an indemnity provided to the Replacement Supplier in connection with:

13.5.1 The employment or termination of employment of any of the Employees (whether or not terminated by notice and, if so terminated, whenever that notice expires);

13.5.2 Any act, omission or default of the Supplier in respect of the employment of the Employees;

13.5.3 The Suppliers failure to inform or consult as required under Regulation 13 of TUPE except to the extent that any such action or claim (or any part of such action or claim) arises from any failure by the Council or the Replacement Supplier to give the Supplier the information required from the Council or the Replacement Supplier to enable the Supplier to comply with its obligations under TUPE; and

13.5.4 The Supplier’s failure to provide the employee liability information under Regulation 11 of TUPE;

13.5.5 Any claims by an Employee that such person is entitled for any reason to take early retirement benefits pursuant to the terms of any pension scheme in which the Council or the Replacement Supplier is not participating, or pursuant to the Employee’s terms and conditions of employment;

13.5.6 The Supplier’s failure to comply with its obligations under Clause 13.6 below;

13.6 The Council shall be entitled to assign the benefit of the indemnity at Clause 13.5 to any Replacement Supplier.

13.7 The Supplier will not in the event of notice of termination of this Contract or from a date of 12 months before expiry of the Contract Period carry out a Prohibited Act.

**14. Variations TO THE DPS AGREEMENT**

14.1 Any variations to the DPS Agreement must be made in writing and agreed by the Council and the Supplier.

14.2 Any variation to the DPS Agreement must not amount to a material change in the DPS Agreement or the Services.

**15. LAW AND JURISDICTION**

The Parties accept the exclusive jurisdiction of the English courts and agree that the DPS Agreement is to be governed by and construed according to English law.

**16**.  **THIRD PARTY RIGHTS**

For the purposes of the Contracts (Rights of Third Parties) Act, 1999 that the DPS Agreement is not intended to, and does not give to any person who is not a party to the DPS Agreement any rights to enforce any provisions contained in the DPS Agreement except for any person to whom the benefit of the DPS Agreement is assigned in accordance with clause 10.

**17.** **ENTIRE AGREEMENT**

17.1 This DPS Agreement including all Schedules constitutes the entire agreement and understanding between the Parties in respect of the matters dealt with in it and supersedes, cancels or nullifies any previous agreement between the Parties in relation to such matters.

17.2 Each of the Parties acknowledges and agrees that in entering into this DPS Agreement it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or undertaking (whether negligently or innocently made) other than as expressly set out in this DPS Agreement. The only remedy available to either Party of such statements, representation, warranty or understanding shall be for breach of contract under the terms of this DPS Agreement.

16.3 Nothing in this Clause 16 shall operate to exclude Fraud or fraudulent misrepresentation

**SCHEDULE 1**

**CALL-OFF TERMS AND CONDITIONS**

**CONTENTS**

**Clause Heading**

**PART A - OPERATIVE PROVISIONS**

A1 DEFINITIONS

A2 HEADINGS

A3 NOTICES

A4 ENTIRE AGREEMENT

**PART B - PROVISION OFSERVICES**

B1 CONTRACT PERIOD

B2 PERFORMANCE

B3 CONTRACT MANAGER

B4 ORDERING PROCESS

B5 RISK IN AND TITLE TO GOODS

B6 WARRANTY

B7 Supplier EMPLOYEES

**PART C - PRICE AND PAYMENT**

C1 PRICE AND PAYMENT

C2 SUPPLIER INCENTIVE PROGRAMME

**PART D - TERMINATION AND CONSEQUENCES OF TERMINATION**

D1 TERMINATION

D2 CONSEQUENCES OF TERMINATION

D3 DISPUTE RESOLUTION PROCEDURE

D4 SURVIVAL

**PART E - INSURANCE AND LIABILITIES**

E1 INSURANCE

E2 INDEMNITY AND LIABILITY

**PART F - PROTECTION OF INFORMATION**

F1 INTELLECTUAL PROPERTY

F2 DATA PROTECTION

F3 FREEDOM OF INFORMATION

F4 CONFIDENTIALITY

F5 RECORD KEEPING AND MONITORING

F6 TRANSPARENCY

**PART G - STATUTORY OBLIGATIONS**

G1 HEALTH AND SAFETY

G2 CORPORATE REQUIREMENTS

G3 LAW AND CHANGE IN LAW

G4 TUPE AND RE-TENDERING

**PART H - GENERAL PROVISIONS**

H1 CONTRACT VARIATION

H2 THIRD PARTY RIGHTS

H3 NO WAIVER

H4 SEVERANCE

H5 ASSIGNMENT, SUB-CONTRACTING AND RESPONSIBILITY

H6 FORCE MAJEURE

H7 INDUCEMENTS

H8 COSTS AND EXPENSES

H9 NO AGENCY OR PARTNERSHIP

H10 NON SOLICITATION AND OFFERS OF EMPLOYMENT

H11 INSPECTION OF SUPPLIERS PREMISES

H12 LAW AND JURISDICTION

APPENDIX 1 – REBATE TABLE

Schedule A - Specification

SCHEDULE B - PRICING

**part a - operative provisions**

1. **DEFINITIONS**

The terms and expressions used in these Call-Off Terms and Conditions shall have the meanings set out below:

|  |  |
| --- | --- |
| “Assigned Employees”  “Authorised Officer”  ”Bribery Laws” | In respect of Clause G4 an individual employed by the Supplier wholly or mainly in the performance of the Services.  the person duly appointed by the Council and notified in writing to the Supplier to act as the representative of the Council for the purpose of the Call-Off Contract in the Contract Particulars or as amended from time to time and in default of such notification the Council’s Head of Procurement or similar responsible officer.  means the Bribery Act 2010 and all other applicable UK legislation, regulations and codes in relation to bribery or corruption. |
| “Business Day” | any day other than a Saturday or Sunday or a public or bank holiday in England. |
| “Calculation Trigger Date” | For any undisputed Invoiced Debt, the Calculation Trigger Date  shall be the date the relevant invoice is correctly received by the Council. For any disputed Invoice Debt, the Calculation Date  shall be the date on which the dispute has been resolved to the  mutual satisfaction of the parties |
| “Call-Off Contract | The agreement (made pursuant to the provisions of the DPS Agreement in respect of the provision of the Services consisting of the following listed documents which shall be read as one document. In the event of ambiguity conflict or contradictions between these documents the conflict will be resolved according to the following order of priority:  the Order Form;  the Contract Particulars;  any Special Terms and Conditions;  the Call-Off Terms and Conditions;  the tender; and  any relevant pre Tender and post Tender clarifications |
| “Call-Off Conditions” Terms | The terms conditions and conditions set out in this document |
| “Change in Law” | the coming into effect or repeal (without re‑enactment or consolidation) in England of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England in each case after the date of this Call-Off Contract. |
| “Commencement Date” | the commencement date stated in the Contract Particulars. |
|  |  |
| “Confidential Information” | any information which has been designated as confidential by either party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the Services, the business, affairs, properties, assets, trading practices, developments, trade secrets, Intellectual Property Rights, know-how, personnel, customers and suppliers of either party, all personal data and sensitive personal data (within the meaning of the Data Protection Act). |
|  |  |
| “Contract Manager” | the person named in the Contract Particulars as the contract manager and any replacement from time to time in accordance with clause B3.2. |
| “Contract Particulars” | means the document detailing the specific core terms which includes (but not be limited to), the Authorised Officer, Contract Manager, Key Personnel, the Specification and relevant contract specific details of the Tender included in the document. |
| “Contract Period” | the period of the Call-Off Contract as stated in the Contract Particulars (and any extension in accordance with clause B1). |
| “Control” | control as defined by section 416 of the Income and Corporation Taxes Act 1988. |
| “Council” | the Council named in the Contract Particulars and where the context so admits includes any person which takes over or assumes the statutory functions or administrative responsibilities of the Council (whether in part or totally) or which is controlled by or is under common control with the Council (and the expression ‘control’ shall mean the power to direct or cause the direction of the general management and policies of the person in question but only for so long as such control exists). |
| “Data Protection legislation” | Data Protection legislation means (i) the General Data Protection Regulation (Regulation (EU) 2016/679) (“the GDPR”), the Law Enforcement Directive (Directive (EU) 2016/680) (“LED”) and any applicable national implementing Laws as amended from time to time; (ii) the Data Protection Act (“DPA 2018”) subject to Royal Assent to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy; |
| “Delivery Instructions”   |  |  | | --- | --- | | “DPS Agreement” |  | | the instructions provided in the Order Form and any other information that the Council considers appropriate to the provision of the Services.  The Dynamic Purchasing System agreement for Waste Materials Streams and Additional Waste Services dated the \*\*\*\* 2018 ; |
| “Employee”  . | any person employed by the Supplier to perform the Call-Off Contract which will also include the Supplier’s servants, agents, voluntary and unpaid workers and subcontractors and representatives or, in respect of clause G4 (TUPE and Re-Tendering) and any other TUPE obligation, an individual employed by the Supplier in the performance of the Services |
| “EIR” | The Environmental Information Regulations 2004. |
|  |  |
| “FOIA” | The Freedom of Information Act 2000. |
| “Force Majeure” | any cause materially affecting the performance by a party of its obligations under this Call-Off Contract arising from any act beyond its reasonable control and affecting either party, including without limitation: acts of God, war, industrial action (subject to clause H6.3), protests, fire, flood, storm, tempest, epidemic, explosion, acts of terrorism and national emergencies. |
| “Good Industry Practice” | the exercise of such degree of skill, diligence, care and foresight which would reasonably and ordinarily be expected from a skilled and experienced Supplier engaged in the supply of Services similar to the Services under the same or similar circumstances as those applicable to the Call-Off Contract. |
|  |  |
| “HRA” | The Human Rights Act 1998. |
| “Intellectual Property Rights” | patents, inventions, trademarks, service marks, logos, design rights (whether registrable or otherwise), applications for any of the foregoing, copyright, database rights, domain names, trade or business names, moral rights and other similar rights or obligations whether registrable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off. |
| “Invoice Payment Date” | shall be the date on which the Council executes its payment run in respect of the relevant Invoiced Debt |
| “Invoiced Debt” | means the gross amount (including, without limitation, all fees, charges, expenses and other sums invoiced, including any applicable VAT and other taxes) that is invoiced to the Council by the Supplier (including all sums invoiced) under or in connection with this Agreement |
| “Key Personnel” | those persons named in the Contract Particulars as being key personnel and any replacement from time to time under clause B6.1.5. |
| “Law” | any applicable Act of Parliament, sub-ordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, exercise of the Royal Prerogative, enforceable community right within the meaning of section 2 of the European Communities Act 1972, bye-law, regulatory policy, guidance or industry code, judgement of a relevant court of law, or directives or requirements of any regulatory body of which the Supplier is bound to comply. |
| “Liabilities”  “Mini Invitation to Tender” | all costs, actions, demands, expenses, losses, damages, claims, proceedings, awards, fines, orders and other liabilities (including reasonable legal and other professional fees and expenses) whenever arising or brought.  Including but not limited to; Call Off Terms and Conditions, Pricing Schedule, Specification, Form of Tender and Non Collusive Certificate. |
| “Order” | an order for Services served by the Council on a Supplier in accordance with the procedures set out in the DPS Agreement; |
| “Order Form” | the document setting out details of an Order in a form to be specified by the Council; |
| “Price” | the price of the Services as set out in the Contract Particulars and specified, in relation to the Call-Off Contract, in the Order Form. Unless otherwise stated, any reference to Price shall be regarded as being exclusive of properly chargeable VAT which shall be separately accounted for. |
| “Pricing Schedule”  “Prohibited Act” | The pricing schedule submitted by the Supplier as part of its Tender as contained within Schedule B.  Include any of the following (i) termination of employment; (ii) or the alteration or change of terms and conditions of any Employees; (iii) or the recruitment of any employees; or (v) relocation or assignment to new duties of any employees, |
| “Replacement Supplier ”  “Services” | any company, organisation or person who replaces the Supplier following termination or expiry of all or part of this Call-Off Contract.  The services described in the Specification to be supplied by the Supplier in accordance with the Call-Off Contract together with all equipment required and any associated goods provided by the Supplier in relation to those services. |
| “Special Terms and Conditions”  “Specification”  “Supplier” | the additional terms and conditions attached which were set out in the Mini Invitation to Tender.  the specification included within Schedule A setting out the Council's detailed requirements in relation to the Services.  the Supplier and where applicable this shall include the Suppliers Employees, sub-contractors, agents, representatives, and permitted assigns and, if the Supplier is a consortium or consortium leader, the consortium members. |
|  |  |
| “Tender”  “Transferring Employees”  “TUPE” | the Supplier’s tender for the Services in response to the Council’s Mini Invitation to Tender.  Means those employees employed wholly or mainly by the Supplier in providing the Services and who will transfer to a Replacement Supplier or the Council (as the case may be) under the provisions of TUPE.  The Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended. |
| ‘VAT’ | Value added tax |
|  |  |

* 1. Any reference to a person shall include any natural person, partnership, joint venture, body corporate, incorporated association, government, governmental agency, persons having a joint or common interest, or any other legal or commercial entity or undertakings.
  2. A reference to any statute, order, regulation or similar instrument shall be construed as a reference to the statute, order, regulation or instrument as amended by any subsequent statute, order, regulation or instrument or as contained in any subsequent re-enactment.

1. **HEADINGS**
   1. The index and headings to the clauses and appendices to and schedules of this Call-Off Contract are for convenience only and will not affect its construction or interpretation.
2. **NOTICES**
   1. Any notice required by this Call-Off Contract to be given by either party to the other shall be in writing and shall be served personally, by fax or by sending it by registered post or recorded delivery to the appropriate address, fax number or email address notified to each other as set out in the Contract Particulars.
   2. Any notice served personally will be deemed to have been served on the day of delivery; any notice sent by post will be deemed to have been served 48 hours after it was posted; any notice sent by fax will be deemed to have been served 24 hoursafter it was despatched and any notice sent by email before 5 p.m. will be deemed to have been served on the day of despatch and otherwise on the following day save where the deemed date of service falls on a day other than a Business Day in which case the date of service will be the following Business Day.
3. **ENTIRE AGREEMENT**
   1. The Call-Off Contract constitutes the entire agreement between the parties relating to the subject matter of the Call-Off Contract. The Call-Off Contract supersedes all prior negotiations, representations and undertakings, whether written or oral, except that this clause A4 shall not exclude liability in respect of any fraudulent misrepresentation.

**Part b - Provision of SERVICES**

B1.**CALL OFF CONTRACT PERIOD**

* 1. The Call-Off Contract shall commence on the Commencement Date and subject to clause B1.2 shall continue for the Contract Period.
  2. If the Contract Period includes an option to extend and the Council intends to take up the option, the Supplier shall be notified in writing within the period stated in the Contract Particulars prior to the commencement of the extension. If no such notification is issued the Call-Off Contract shall automatically expire after the initial Contract Period.

1. **PERFORMANCE**
   1. The Services shall be provided in accordance with any Delivery Instructions. If no time for delivery is stated in the Delivery Instructions the Services shall be delivered between 9 a.m. and 5 p.m. on a Business Day.
   2. The time of the delivery of the Services is of essence to the Call-Off Contract.

B2.3 The Council will have the right to observe the Suppliers performance of the Services if the Services are not being performed on the Council’s premises.

B2.4 If the Supplier at any time becomes aware of any act or omission, or proposed act or omission by the Council which prevents or hinders, or may prevent or hinder the Supplier from performing the Services in accordance with the Call-Off Contract, the Supplier shall inform the Council and the Council may, at its absolute discretion, extend the period of the Call-Off Contract accordingly.

B2.5 If the Supplier at any time becomes aware of any material matter that could affect the performance of the Services in accordance with the Call-Off Contract, the Supplier shall inform the Council immediately.

B2.6 If the Supplier has a change in Control, the Supplier shall inform the Council as soon as reasonably practicable.

B2.7 The Council retains the Supplier for the performance of the Services on a non exclusive basis.

1. **CONTRACT MANAGER**
   1. The Supplier shall employ a competent and authorised Contract Manager empowered to act on behalf of the Supplier for all purposes connected with the DPS Agreement.
   2. The Supplier shall forthwith give notice in writing to the Council of any change in the identity, address and telephone numbers of the person appointed as Contract Manager. The Supplier shall give maximum possible notice to the Council before changing its Contract Manager.
2. **ORDERING PROCESS**
   1. Orders shall be placed by the Council and be accepted by the Supplier in accordance with the provisions of the DPS Agreement.
3. **RISK IN AND TITLE TO** **goods** 
   1. Risk in any goods provided as part of the Services shall pass to the Council upon delivery without prejudice to any rights of rejection which may accrue to the Council under the Call-Off Contract or otherwise.
   2. Title in any goods provided as part of the Services shall pass to the Council upon delivery or earlier payment.
4. **WARRANTY**
   1. The Supplier warrants to the Council that the Goods and Services will be provided:
      1. in a proper, skilful and workmanlike manner;
      2. by a sufficient number of appropriately qualified, trained and experienced personnel with a high standard of skill, care and due diligence and in accordance with Good Industry Practice;
      3. in accordance with the Call-Off Contract and any descriptions provided by the Supplier ;
      4. to the reasonable satisfaction of the Authorised Officer;
      5. by Key Personnel (if any) who shall not be released from providing the Services permanently without the agreement of the Council, except by reason of sickness, maternity leave, paternity leave, termination of employment or because they have been requested to do so by the Council, or the element of the Services in respect of which the individual was engaged has been completed to the Council’s satisfaction or other extenuating circumstances explained to the Council. Any replacements for the Key Personnel shall be subject to the agreement of the Council and such replacements shall be of at least equal status or of equivalent experience and skills to the Key Personnel being replaced and be suitable for the responsibilities of that person in relation to the Services. The cost of effecting such replacement shall be borne by the Supplier; and
      6. in a way that the Supplier takes every reasonable precaution to safeguard the Council’s property entrusted to the care of the Supplier.

B6.2 The Supplier warrants to the Council that to the extent that any goods, equipment or consumables are provided as part of the services they will:

B6.2.1 be free from defects in design, material and workmanship; and

B6.2.2 be so formulated, designed, constructed, finished and packaged as to be safe and without risk to health.

B6.3 Without prejudice to the Council’s rights to terminate under clause D1 (Termination), if any of the Services supplied are not in accordance with the Call-Off Contract, the Council shall be entitled to:

B6.3.1 require the Supplier to provide replacement Services in accordance with the Call-Off Contract as soon as reasonably practicable and in any event within fourteen (14) days of a request to do so; or

B6.3.2 subject to clause E2 (Indemnity and Liability) require repayment of the proportion of the Price which has been paid in respect of such Services together with payment of any additional expenditure over and above the Price reasonably incurred by the Council in obtaining replacement Services.

1. **Supplier’S EMPLOYEES**
   1. The Council reserves the right under the Call-Off Contract to refuse to admit to, or to withdraw permission to remain on, any premises occupied by or on behalf of the Council:
      1. any member of the Supplier’s Employees; and/or
      2. any person employed or engaged by a sub-contractor, agent or servant of the Supplier

whose admission or continued presence would be, in the reasonable opinion of the Council, undesirable.

* 1. When directed by the Council, the Supplier shall provide a list of the names and addresses of all persons (if any) who it is expected may require admission in connection with the Call-Off Contract to any premises occupied by or on behalf of the Council, specifying the capacities in which they are concerned with the Call-Off Contract and giving such other particulars as the Council may reasonably desire.
  2. The Supplier’s Employees, engaged within the boundaries of any of the Council’s premises, shall comply with such rules, regulations and requirements (including those relating to security arrangements) as may be in force from time to time for the conduct of personnel when at that establishment and when outside that establishment.
  3. The decision of the Council as to whether any person is to be refused access to any premises occupied by or on behalf of the Council shall be final and conclusive.
  4. The Supplier shall replace any of the Supplier’s Employees who the Council reasonable decides have failed to carry out their duties with reasonable skill and care. Following the removal of any of the Supplier’s Employees for any reason, the Supplier shall ensure such person is replaced promptly with another person with the necessary training and skills to meet the requirements of the Services.
  5. The Supplier shall bear the cost of or costs arising from any notice, instruction or decision of the Council under this clause.

**part c - PRICE AND PAYMENT**

1. **PRICE AND PAYMENT**
   1. The Council shall pay the Price for the Services to the Supplier.
   2. The Price shall be fixed for the duration of the Contract Period.
   3. The Supplier shall submit a single VAT invoice to the Council no later than seven (7) days after the end of each calendar month detailing the Services provided during the calendar month and the amount payable.
   4. Payment of any undisputed invoice will be made no later than thirty (30) days following the date of receipt of the invoice by the Council.
   5. The Council reserves the right to withhold payment of the relevant part of the Price without payment of interest where the Supplier has either failed to provide the Services at all or has provided the Services inadequately and any invoice relating to such Services will not be paid unless or until the Services have been performed to the Council’s satisfaction.
   6. Any overdue sums will bear interest from the due date until payment is made at 4% per annum over the Co-operative Bank plc base rate from time to time. The Supplier is not entitled to suspend provision of the Services as a result of any overdue sums.
   7. The Council will be entitled but not obliged at any time or times without notice to the Supplier to set off any liability of the Council to the Supplier against any liability of the Supplier to the Council (in either case howsoever arising and whether any such liability is present or future, liquidated or unliquidated and irrespective of the currency) and may for such purpose convert or exchange any sums owing to the Supplier into any other currency or currencies in which the obligations of the Council are payable under this Call-off Contract. The Council’s rights under this clause will be without prejudice to any other rights or remedies available to the Council under this Contract or otherwise.
   8. Further details of payment, if any, are set out in the Pricing Schedule.

C2. **Supplier Incentive Programme**

C2.1 Notwithstanding any other terms of this Agreement, for the duration of the term of this Agreement, the Supplier acknowledges and agrees that in consideration of the Council paying an Invoiced Debt owed to the Supplier under or in connection with this Agreement prior to the date by which such payment of that Invoiced Debt would otherwise be required under the terms of this Agreement, the Council shall, notwithstanding any provision in this Agreement prohibiting the Council’s right to set-off sums owed to it by the Supplier r against any sums due to the Supplier , be entitled to deduct and retain from that Invoiced Debt, for its own benefit, such percentage of that Invoiced Debt (the “Rebate”) that is calculated in accordance with Appendix 1.

C.2.2 For the avoidance of doubt, nothing in clause C2.1 shall:

C2.2.1 affect the date by which payment of an Invoiced Debt is required to be made by the Council; or

C2.2.2 require the Council to make early payment to the Supplier in respect of any Invoiced Debt.

**C2.3 Incorrect Application of Rebates**

C2.3.1 In the event the Supplier , acting reasonably, considers that the Council has incorrectly applied a Rebate it shall raise a query in respect of that Rebate with the Council’s Invoice Management Team (whose details will be provided to the Supplier by the Council as updated from time to time) within seven (7) days of the relevant Rebate being applied.

C2.3.2 If the Supplier does not raise a genuine query under clause C2.3.1 within seven (7) days of the relevant Rebate being applied, the Council shall be deemed to have applied the Rebate correctly in that instance and shall be entitled to retain that Rebate.

C2.3.3 The parties shall use reasonable endeavours to resolve any query raised in accordance with clause C2.3.1 in a timely manner, including making relevant personnel available for the purpose.

**C2.4 E-Invoicing**

The parties agree to implement e-invoicing within one (1) month of signing this Agreement. The Supplier will send electronic copies of their invoices:

C2.4.1 in machine generated PDF, Word or Excel format (i.e. produced directly from Supplier billing application or PC program);

C2.4.2 to the designated Council invoice receiving email address [sipinvoices@southtynesidesip.co.uk](mailto:sipinvoices@southtynesidesip.co.uk)

**C2.5 Supplier Portal**

C2.5.1 The Council may make proposals to implement an online portal to administer the supplier incentive programme and the Supplier agrees to consider such proposals in good faith and not refuse reasonable amendments to this Agreement to reflect such proposals.

C2.5.2 In the event that the Council implements an online portal the Council shall grant (insofar as it has the power to do so) to the Supplier a revocable, royalty free, non-exclusive, worldwide licence to use the online portal for the sole purpose of meeting its obligations under and realising its benefits arising from this Agreement.

C2.5.3 The Supplier shall not transfer the licence granted under clause C2.5.2, without the prior written consent of the Council.

C2.5.4 The licence granted at clause C2.5.2 shall continue for the duration of this Agreement or its earlier termination or until the Council decides for any reason to terminate the licence (by notifying the Supplier in writing), whichever occurs first.

C2.5.5 Notwithstanding anything to the contrary in this Agreement, any and all intellectual property rights in the online portal shall remain vested in the Council and/or any other third party or parties that supplied the online portal (or any part of it) to the Council.

**part d - termination AND CONSEQUENCES OF TERMINATION**

1. **TERMINATION**

D1.1 Subject to the provisions of clause H6 (Force Majeure) the Council may terminate the Call-Off Contract with immediate effect by notice in writing to the Supplier on or at any time if:

D1.1.1 the Supplier becomes bankrupt, insolvent, makes any composition with its creditors, has a receiver appointed under the Mental Health Act 1983 or dies; or

D1.1.2 the Supplier is convicted of a criminal offence; or

D1.1.3 the Supplier ceases or threatens to cease to carry on its business; or

D1.1.4 the Supplier has a change in Control which the Council believes will have a substantial impact on the performance of the Call-Off Contract; or

D1.1.5 there is a risk or a genuine belief that reputational damage to the Council will occur as a result of the Call-Off Contract continuing; or

D1.1.6 the Supplier is in breach of any of its obligations under this Call-Off Contract that is capable of remedy and which has not been remedied to the satisfaction of the Council within 14 days, or such other reasonable period as may be specified by the Council after issue of a written notice specifying the breach and requesting it to be remedied; or

D1.1.7 there is a material or substantial breach by the Supplier of any of its obligations under this Call-Off Contract which is incapable of remedy; or

D1.1.8 the Supplier commits persistent minor breaches of this Call-Off Contract whether remedied or not.

D1.1.9 the Supplier is guilty of any conduct bringing itself or the Council into serious public disrepute, including but not limited to, a breach of clause H7 (Inducements).

D1.2 The Council reserves the right to terminate the Call-Off Contract in part in the case of termination under clauses D1.1.6, D1.1.7 and D1.1.8.

D1.3 The Council reserves the right to terminate the Call-Off Contract at will, in whole or in part, at any time with or without notice except that it will give as much notice as possible in the circumstances.

D1.4 Termination of the Call-Off Contract under this clause D1 shall not cause the DPS Agreement to terminate automatically. For the avoidance of doubt, the DPS Agreement shall remain in force unless and until it is terminated or expires by its own terms.

D1.5 Termination of this Call-Off Contract under this clause D1 shall not cause other Call-Off Contracts, which may have been entered into separately by the Parties under the DPS Agreement, to terminate automatically.

**D2. CONSEQUENCES OF TERMINATION**

D2.1 If this Call-Off Contract is terminated in whole or in part the Council shall:

D2.1.1 be liable to pay to the Supplier only such elements of the Price, if any, that have properly accrued in accordance with the Call-Off Contract or the affected part of the Call-Off Contract up to the time of the termination; and/or

D2.1.2 except for termination under clause D1.3, be entitled to deduct from any sum or sums which would have been due from the Council to the Supplier under this Call-Off Contract or any other contract and to recover the same from the Supplier as a debt any sum in respect of any loss or damage to the Council resulting from or arising out of the termination of this Call-Off Contract. Such loss or damage shall include the reasonable cost to the Council of the time spent by its officers in terminating the Call-Off Contract and in making alternative arrangements for the supply of the Services or any parts of them; and/or

D2.1.3 where termination arises under clause D1.3, pay to the Supplier any reasonable, direct and quantifiable costs reasonably incurred by the Contractor due to early termination subject to the maximum liability provision in clause E2.4; and/or

D2.1.4 in the event that any sum of money owed by the Supplier to the Council (the Suppliers debt) exceeds any sum of money owed by the Council to the Supplier (the Council’s debt) under this Call-Off Contract then the Council shall, at its sole discretion, be entitled to deduct the Suppliers debt from any future Council’s debt or to recover the Suppliers debt as a civil debt.

D2.2 Upon the termination of the Call-Off Contract for any reason, subject as otherwise provided in this Call-Off Contract and to any rights or obligations which have accrued prior to termination, neither party shall have any further obligation to the other under the Call-Off Contract.

**D3. DISPUTE RESOLUTION PROCEDURE**

D3.1 If a dispute arises between the Council and the Supplier in connection with the Call-Off Contract, the parties shall each use reasonable endeavours to resolve such dispute by means of prompt discussion at an appropriate managerial level.

D3.2 If a dispute is not resolved within fourteen (14) days of referral under clause D3.1 then either party may refer it to the Chief Executive or appropriate nominated officer of each party for resolution who shall meet for discussion within 14 days or longer period as the parties may agree.

D3.3 Provided that both parties consent, a dispute not resolved in accordance with clauses D3.1 and D3.2, shall next be referred at the request of either party to a mediator appointed by agreement between the parties within 14 days of one party requesting mediation with the costs of mediation determined by the mediator.

D3.4 Nothing in this clause shall preclude either party from applying at any time to the English courts for such interim or conservatory measures as may be considered appropriate.

**D4. SURVIVAL**

D4.1 The following clauses will survive termination or expiry of the Call-Off Contract: Clause B5 (Risk in and Title to the Goods), Clause D2 (Consequences of Termination), Clause F1 (Intellectual Property), Clause F2 (Data Protection), Clause F3 (Freedom of Information), Clause F4 (Confidentiality), Clause F5 (Record Keeping and Monitoring), Clause F6 (Transparency), Clause H4 (Severance), Clause H10 (Non Solicitation and Offers of Employment) and Clause H12 (Law and Jurisdiction).

**part e - insurance and liabilities**

1. **INSURANCE**
   1. The Supplier shall maintain insurance necessary to cover any liability arising under the Call-Off Contract as set out in the Contract Particulars.
   2. The Supplier shall prior to the Commencement Date and on each anniversary of the Commencement Date and/or upon request provide evidence that all premiums relating to such insurances have been paid.
   3. If the Supplier does not maintain the necessary insurances under the Call-Off Contract the Council may insure against any risk in respect of the default and may charge the Supplier the cost of such insurance together with a reasonable administration charge.
2. **INDEMNITY AND LIABILITY**
   1. Neither party seeks to exclude or limit its liability for:
      1. death or personal injury caused by its negligence (but will not be liable for death or personal injury caused by the other party’s negligence);
      2. fraudulent misrepresentation; or
      3. any other matter in respect of which, as a matter of Law, liability cannot be excluded or limited.
   2. Except as specifically provided, neither party shall in any event be liable to the other for any indirect or consequential loss (including loss of profit, loss of business opportunity, loss of business, loss of goodwill, loss of production and pure economic loss) however caused.
   3. Subject to clauses E2.1, E2.2 and E2.5, the Supplier’s liability to the Council under the Call-Off Contract whether in contract, tort (including negligence) or otherwise shall be limited to 125% of the proportion of the Price which is paid and payable at the time that the liability arises.
   4. Subject to clauses E2.1 and E2.2, the Council’s liability to the Supplier under the Call-Off Contract whether in contract, tort (including negligence) or otherwise shall be limited to 125% of the proportion of the Price which is paid and payable at the time that the liability arises.
   5. The Supplier shall indemnify the Council in full without limit of liability for any direct loss of or damage to the real or personal property of the Council or any third party, including Intellectual Property Rights, or injury claimed by any third party and against all Liabilities awarded against or incurred by the Council (including legal expenses on an indemnity basis) arising from the Supplier’s negligence, any defect or fault in the Goods or any act or omission of the Supplier in delivering the Services.

**PART F - PROTECTION OF INFORMATION**

1. **INTELLECTUAL PROPERTY**
   1. All Intellectual Property Rights in any specifications, instructions, plans, data, drawings, databases, patents, patterns, models, designs or other material:
      1. provided to the Supplier by the Council shall remain the property of the Council;
      2. prepared by or for the Supplier specifically for the use, or intended use, in relation to the performance of the Call-Off Contract shall belong to the Council subject to any exceptions set out in the Contract Particulars.
   2. The Supplier shall obtain necessary approval before using any material, in relation to the performance of the Call-Off Contract which is or may be subject to any third party Intellectual Property Rights. The Supplier shall procure that the owner of the Intellectual Property Rights grant to the Council a non-exclusive licence, or if the Supplier is itself a licensee of those rights, the Supplier shall grant to the Council an authorised sub-licence, to use, reproduce, and maintain the Intellectual Property Rights. Such licence or sub-licence shall be non-exclusive, perpetual and irrevocable, shall include the right to sub-license, transfer, novate or assign to other Councils, the Replacement Supplier or to any other third party providing Goods to the Council, and shall be granted at no cost to the Council.
   3. It is a condition of the Call-Off Contract that the Goods will not infringe any Intellectual Property Rights of any third party and the Supplier shall during and after the Contract Period on written demand indemnify and keep indemnified without limitation the Council against all Liabilities which the Council may suffer or incur as a result of or in connection with any breach of this clause, except where any such claim relates to the act or omission of the Council.
   4. At the termination of the Call-Off Contract the Supplier shall at the request of the Council immediately return to the Council all materials, work or records held in relation to the Services, including any back-up media.

1. **DATA PROTECTION**
   1. The Supplier shall (and shall procure that any of its Employees involved in the provision of the Goods) comply with any requirements under the DPA.
2. **FREEDOM OF INFORMATION**
   1. The Council is subject to the FOIA and the EIR (“the Acts”). As part of the Council's duties under the Acts, it may be required to disclose information forming part of the Call-Off Contract to anyone who makes a reasonable request. The Council has absolute discretion to apply or not to apply any exemptions under the Acts.
   2. The Supplier shall assist and cooperate with the Council (at the Supplier’s expense) to enable the Council to comply with the information disclosure requirements under the Acts and in so doing will comply with any timescale notified to it by the Council.

F4. **CONFIDENTIALITY**

F4.1 Except to the extent set out in this clause or where disclosure is expressly permitted elsewhere in this Contract, each party shall do each of the following:

F4.1.1 Treat the other party’s Confidential Information as confidential and safeguard it accordingly; and

F4.1.2 Not disclose the other party’s Confidential Information to any other person without the owner’s prior written consent.

F4.2 Clause F4.1 shall not apply to the extent that any one or more of the following applies to the relevant information or disclosures:

F4.2.1 Such disclosure is a requirement of Law placed upon the party making the disclosure, including any requirements for disclosure under the FOIA, Code of Practice on Access to Government Information or the EIR pursuant to clause F3 (Freedom of Information);

F4.2.2 Such information was in the possession of the party making the disclosure without obligation of confidentiality prior to its disclosure by the information owner;

F4.2.3 Such information was obtained from a third party without obligation of confidentiality;

F4.2.4 Such information was already in the public domain at the time of disclosure otherwise than by a breach of this Call-Off Contract; and

F4.2.5 It is independently developed without access to the other party’s Confidential Information.

F4.3 The Supplier may only disclose the Council’s Confidential Information to the Supplier personnel who are directly involved in the provision of the Services and who need to know the information, and shall make sure that such Supplier personnel are aware of and shall comply with these obligations as to confidentiality.

F4.4 The Supplier shall not, and shall procure that the Supplier personnel do not, use any of the Council’s Confidential Information received other than for the purposes of this Call-Off Contract.

F4.5 At the written request of the Council and if reasonable in the circumstances to make that request, the Supplier shall procure that those members of the Supplier personnel identified in the Contract Particulars sign a confidentiality undertaking prior to commencing any work in accordance with this Call-Off Contract.

F4.6 Nothing in this Call-Off Contract shall prevent the Council from disclosing the Supplier’s Confidential Information in any one or more of the following circumstances:

F4.6.1 To any Crown body or any other as defined in Regulation 5(2) of the Public Contracts (Works, Goods and Supply) (Amendment) Regulations 2000 other than the Council. All crown bodies or such contracting authorities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other Crown bodies or other such contracting authorities on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any Crown body or other contracting authority;

F4.6.2 To any consultant, Supplier or other person engaged by the Council or any person conducting an Office of Government Commerce gateway review;

F4.6.3 For the purpose of the examination and certification of the Council’s accounts; and/or;

F4.6.4 For any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Council has used its resources.

F5. **RECORD KEEPING AND MONITORING**

F5.1 In order to assist the Council in its record keeping and monitoring requirements including auditing and National Audit Office requirements, the Supplier shall keep and maintain for six (6) years (or such longer time period required in accordance with any specific legislation) after the Call-Off Contract has been completed, full and accurate records of the Call-Off Contract including the Services supplied under it, all expenditure reimbursed by the Council, and all payments made by the Council. The Supplier shall on request allow the Council or the Council’s representatives such access to (and copies of) those records as may be required by the Council in connection with the Call-Off Contract.

F5.2 The Supplier will at its own cost, provide any information that may be required by the Council to comply with the Council’s procedures for monitoring of the Call-Off Contract.

F6. **TRANSPARENCY**

F6.1 In order to comply with the Government’s policy on transparency in the areas of contracts and procurement the Council will be disclosing information on its website with effect from the 1st January 2011 in relation to monthly expenditure over £500 (five hundred pounds). The information will include the Supplier’s name and the monthly Price paid. The parties acknowledge that this information is not Confidential Information or commercially sensitive information.

F6.2 The parties acknowledge that, except for any information which is exempt from disclosures in accordance with the provisions of the FOIA, the content of this Call-Off Contract is not Confidential Information or commercially sensitive information. The Council shall be responsible for determining at its absolute discretion whether any of the content of the Call-Off Contract is for disclosure in accordance with the FOIA. Notwithstanding any other term of this Call-Off Contract, the Supplier hereby gives his consent for the Council to publish the Call-Off Contract in its entirety (but with any information which is exempt from disclosure in accordance with the FOIA redacted) including from time to time agreed changes to the Call-Off Contract, to the general public.

**part g - statutory obligations**

1. **HEALTH AND SAFETY**

The Supplier shall comply with all health and safety legislation in force and all health and safety policies of the Council.

The Supplier shall provide, within 14 days of receipt, copies of any communication concerning the health, safety, welfare, environmental or fire safety standards of the Services, received from any statutory body.

**CORPORATE REQUIREMENTS**

The Supplier shall comply with all obligations under the HRA.

The Supplier shall not unlawfully discriminate within the meaning and scope of any law, enactment, order, or regulation relating to discrimination (whether age, race, gender, religion, disability, sexual orientation or otherwise) in employment.

The Supplier shall comply with all relevant legislation relating to its Employees however employed including (but not limited to) the compliance in law of the ability of the Employees to work in the United Kingdom.

If the Supplier has a finding against it relating to its obligations under clause G2.4 it will provide the Council with:

details of the finding; and

the steps the Supplier has taken to remedy the situation.

**LAW AND CHANGE IN LAW**

The Supplier shall comply at all times with the Law in its performance of the Call-Off Contract.

On the occurrence of a Change in Law which has a direct effect upon the Price the parties shall meet within fourteen (14) days of the Supplier notifying the Council of the Change in Law to consult and seek to agree the effect of the Change in Law and any change in the Price as a result following the principle that this clause is not intended to create an artificial cushion from market forces for the Supplier. If the parties, within fourteen (14) days of this meeting, have not agreed the occurrence or the impact of the Change in Law, either party may refer the matter to dispute resolution in accordance with clause D3.

Any agreed additional sums payable as a result of the operation of clause G3.2 shall be included in the Price. For the avoidance of doubt nothing in this Call-Off Contract is intended to allow the Supplier double recovery of any increase in costs.

**TUPE AND RE-TENDERING**

G4.1 In the event of expiry or termination of this Call-Off Contract or whenever reasonably requested by the Council in preparation for tendering arrangements the Supplier will provide the Council with such assistance as the Council may require and provide at no cost to the Council any information the Council (whether on its own account or on behalf of any potential or confirmed Replacement Supplier) may request in relation to the Employees. The required information is set out below but is not necessarily restricted to the following:

G4.1.1 The total number of Employees whose employment with the Supplier in respect of the Services is likely to be terminated at the expiry of this Call-Off Contract but for any operation of law;

G4.1.2 In respect of each Employee their age and gender, details of their salary and payment settlements which relate to future dates but which have already been agreed and their redundancy entitlements (the names of individual employees do not have to be given); and

G4.1.3 Full information about the other terms and conditions under which the Employees are employed (including but not limited to their working arrangements) or about where that information can be found; and

G4.1.4 Details of pension entitlements, if any; and

G4.1.5 Job titles of the Employees affected and the qualifications required for each position; and

G4.1.6 Disciplinary procedures taken against any Employees and any grievance procedures taken out by any Employees within the previous two years; and

G4.1.7 Details of any court or tribunal case, claim or action brought by any Employees against the Supplier within the previous two years; and

G4.1.8 Details of any court or tribunal case claim or action, which the Supplier has reasonable grounds to believe that any of the Employees may bring against the Supplier or a Replacement Supplier arising out of the Employee’s employment.

G4.2 The Supplier shall permit the Council to use the information for the purposes of TUPE and for re-tendering. The Council shall be able to disclose this information to any prospective tenderer or Replacement Supplier without requiring the Council to enter in to a confidentiality agreement or otherwise imposing any conditions upon the disclosure of the information. The Supplier will secure all necessary consents from relevant Employees in order to release the information.

G4.3 The Supplier will co-operate with the re-tendering of the Service by allowing the Replacement Supplier to communicate with and meet with the Employees and/or their representative(s).

G4.4 In the event that the information provided by the Supplier in accordance with Clause G4 becomes inaccurate, whether due to changes to the employment and personnel details of the Employees made subsequent to the original provision of such information or by reason of the Supplier becoming aware that the information originally given was inaccurate the Supplier shall notify the Council of the inaccuracies and provide the amended information.

G4.5 The Supplier will keep the Council and any Replacement Supplier indemnified in full against all Liabilities arising directly or indirectly and whether incurred by the Council pursuant to an indemnity provided to the Replacement Supplier in connection with:

G4.5.1 The employment or termination of employment of any of the Employees (whether or not terminated by notice and, if so terminated, whenever that notice expires);

G4.5.2 Any act, omission or default of the Supplier in respect of the employment of the Employees;

G4.5.3 The Supplier’s failure to inform or consult as required under Regulation 13 of TUPE except to the extent that any such action or claim (or any part of such action or claim) arises from any failure by the Council or the Replacement Supplier to give the Supplier the information required from the Council or the Replacement Supplier to enable the Supplier to comply with its obligations under TUPE; and

G4.5.4 The Supplier’s failure to provide the employee liability information under Regulation 11 of TUPE;

G4.5.5 Any claims by an Employee that such person is entitled for any reason to take early retirement benefits pursuant to the terms of any pension scheme in which the Council or the Replacement Supplier is not participating, or pursuant to the Employee’s terms and conditions of employment;

G4.5.6 The Supplier’s failure to comply with its obligations under Clause G4.;

G4.6 The Council shall be entitled to assign the benefit of the indemnity at Clause G4.5 to any Replacement Supplier.

G4.7 The Supplier will not in the event of notice of termination of this Contract or from a date of 12 months before expiry of the Contract Period carry out a Prohibited Act.

**part H - general provisions**

**CONTRACT VARIATION**

Subject to clause H1.2, no variation or modification to the Call-Off Contract is valid unless it is in writing and signed by the Council and the Supplier.

The Council shall be entitled to issue to the Supplier in writing or, in case of urgency orally (provided the Council confirms oral instructions in writing as soon as it is practicable), variation orders requiring the addition, suspension, reduction or cessation of provision of any Services and/or the provision of emergency Services in accordance with revised Delivery Instructions. The Supplier shall charge for the impact of the variation order in accordance with the rates and prices used to calculate the Price in the Tender.

**THIRD PARTY RIGHTS**

This Call-Off Contract is enforceable by the original parties to it, by their successors in title and permitted assignees. Any rights of any person to enforce the terms of this Call-Off Contract pursuant to The Contracts (Rights of Third Parties) Act 1999 are excluded.

**NO WAIVER**

Failure by either party at any time to enforce any one or more of the provisions of this Call-Off Contract or to require performance by the other party of any of the provisions shall not constitute or be construed as a waiver of the provision or of the right at any time subsequently to enforce all terms and conditions of this Call-Off Contract nor affect the validity of the Call-Off Contract or any part of it or the right of the parties to enforce any provision in accordance with its terms.

No waiver of any of the provisions of this Call-Off Contract shall be effective unless it is expressed to be a waiver in writing and communicated in accordance with clause A3 (Notices).

**SEVERANCE**

If any provision of the Call-Off Contract shall become or shall be declared by any court of competent jurisdiction to be invalid or unenforceable in any way, such invalidity shall not impair or affect any other provision all of which shall remain in full force and effect.

**ASSIGNMENT, SUB-CONTRACTING AND RESPONSIBILITY**

Subject to any express provision of this Call-Off Contract, the Supplier shall not without the prior written consent of the Council, assign all or any benefit, right or interest under this Call-Off Contract or sub-contract the provision of the Services.

The Council shall be entitled to:

assign, novate or dispose of its rights and obligations under this Call-Off Contract either in whole or part to any contracting authority (as defined in The Public Contracts Regulations 2015 as amended); or

transfer, assign or novate its rights and obligations where required by Law.

The Supplier shall remain responsible and liable for the acts and omissions of any other members of a consortium arrangement, sub-contractors, servants, agents and Employees as though they were its own.

H5.4 Notwithstanding Clauses H5.1 and H5.2 the Supplier may assign to a third party (“the Payment Assignee”) the right to receive payment of the Price or any part thereof due to the Supplier under this Call-Off Contract. Any assignment under this Condition shall be subject to:

H5.4.1 Reduction of any sums in respect of which the Council exercises its right of recovery;

H5.4.2 All related rights of the Council under the Call-Off Contract in relation to the recovery of sums due but unpaid; and

H5.4.3 The Council receiving notification both under Conditions H5.1 and H5.4

H5.5 In the event the Supplier assigns the right to receive the Price under Condition H5.4 the Supplier or the Payment Assignee shall notify the Council in writing of the assignment and the date upon which the assignment becomes effective.

H5.6 The Supplier shall notify the Council in writing of the Payment Assignee’s contact information and bank account details to which the Council shall make payment.

H5.7 The provisions of C1 (Price and Payment) shall continue to apply in all other respects after the assignment and shall not be amended without the approval of the Council.

**FORCE MAJEURE**

Neither party shall be liable for failure to perform its obligations under the Call-Off Contract if such failure results from Force Majeure.

If the Council or the delivery location is affected by circumstance of Force Majeure, the Council shall be entitled to, totally or partially, suspend the date or dates for delivery of the Services until the circumstances of the Force Majeure have ceased. The suspension shall not give rise to any claim by the Supplier against the Council nor entitle the Supplier to terminate the Call-Off Contract.

Industrial action by, or illness or shortage of the Supplier’s Employees, agents or subcontractors, failure or delay by any of the Supplier’s suppliers to supply goods, services or materials and breach of the Supplier’s warranties under clause B6 shall not be regarded as an event of Force Majeure.

If the event of Force Majeure continues for more than two (2) months either party may give written notice to the other to terminate the Call-Off Contract immediately or on a set termination date.

If the Call-Off Contract is terminated in accordance with clause H6.4 neither party will have any liability to the other except that any rights and liabilities which accrued prior to termination will continue to exist.

**INDUCEMENTS**

H7.1 The Supplier shall comply with the applicable Bribery Laws including ensuring that it has in place adequate procedures to prevent bribery and ensure compliance with the Bribery Laws (as updated from time to time), and shall use all reasonable endeavours to ensure that:

H7.1.1 all of the Supplier’s personnel

H7.1.2 all others associated with the Supplier, and

H7.1.3 all of the Supplier’s subcontractors, involved in performing the Services or with this Agreement so comply. The expressions ‘adequate procedures’ and ‘associated’ shall be construed in accordance with the Bribery Act 2010 and documents published under it.

H7.2 The Supplier warrants that it has not paid commission nor agreed to pay any commission to any Employee or representative of the Council by the Supplier or on the Supplier’s behalf.

H7.3 Where the Supplier engages in conduct prohibited by clauses H7.1 and H7.2 in relation to this or any other contract with the Council, the Council has the right to:

H7.3.1 terminate the Call-Off Contract and recover from the Supplier the amount of any loss suffered by the Council resulting from the termination, including the cost reasonably incurred by the Council of making other arrangements for the provision of the Services and any additional expenditure incurred by the Council throughout the remainder of the Contract Period; or

H7.3.2 recover in full from the Supplier any other loss sustained by the Council in consequence of any breach of this clause whether or not the Call-Off Contract has been terminated.

**COSTS AND EXPENSES**

Each of the parties will pay their own costs and expenses incurred in connection with the negotiation, preparation, execution, completion and implementation of this Call-Off Contract.

**NO AGENCY OR PARTNERSHIP**

Nothing contained in this Call-Off Contract, and no action taken by the parties pursuant to this Call-Off Contract, will be deemed to constitute a relationship between the parties of partnership, joint venture, principal and agent or employer and employee. Neither party has, nor may it represent that it has, any authority to act or make any commitments on the other party’s behalf.

**NON SOLICITATION AND OFFERS OF EMPLOYMENT**

The Supplier agrees that it will not, without the prior written consent of the Council, whether directly or indirectly, and whether alone or in conjunction with, or on behalf of, any other person and whether as a principal, shareholder, director, Employee, agent, consultant, partner or otherwise during the Contract Period or for a period of 12 months following termination of this Call-Off Contract:

solicit or entice, or endeavour to solicit or entice, away from the Council, any person directly related to the Services employed in a senior capacity in a managerial, supervisory, technical, sales or administrative capacity by, or who is or was a consultant to, the Council at the date of the termination of this Call-Off Contract or at any time during the period of one month immediately preceding the date of termination; or

attempt, or knowingly assist or procure any other person to do the above.

**INSPECTION OF SupplierS PREMISES**

The Supplier shall permit the Council to make any inspections or tests which may reasonably be required in respect of the Supplier’s premises in relation to the Call-Off Contract.

**LAW AND JURISDICTION**

This Call-Off Contract shall be governed by the laws of England and shall be subject to the exclusive jurisdiction of the English courts.

**Appendix 1**

Rebates which the Council may deduct and retain

|  |  |
| --- | --- |
| Number of day elapsed between the Calculation Trigger Date and the Invoice Payment Date | % of the amount owed that may be deducted and retained by the Council as the Rebate |
| 1 | 1.58% |
| 2 | 1.52% |
| 3 | 1.47% |
| 4 | 1.41% |
| 5 | 1.36% |
| 6 | 1.30% |
| 7 | 1.25% |
| 8 | 1.20% |
| 9 | 1.14% |
| 10 | 1.09% |
| 11 | 1.03% |
| 12 | 0.98% |
| 13 | 0.92% |
| 14 | 0.87% |
| 15 | 0.82% |
| 16 | 0.76% |
| 17 | 0.71% |
| 18 | 0.65% |
| 19 | 0.60% |
| 20 | 0.54% |
| 21 | 0.49% |
| 22 | 0.43% |
| 23 | 0.38% |
| 24 | 0.33% |
| 25 | 0.27% |
| 26 | 0.22% |
| 27 | 0.16% |
| 28 | 0.11% |
| 29 | 0.05% |
| 30 | 0.00% |

Calculation of the Rebate:

The Rebate is calculated by establishing the number of days that have elapsed between the Calculation Trigger Date and the Invoice Payment Date and comparing the number of days elapsed within the first column of the table above to determine the Rebate to be applied to the invoiced amounts. The Rebate percentage (%) is calculated to 14 decimal places and it is this value that is applied in all calculations. However, for simplicity, the Rebate % displayed in the table above has been rounded to 2 decimal places.

Rebates applied to invoices are calculated at an invoice line item level. Rebates are applied in the manner described at (a) immediately above, against the value of each line item. The result of this calculation is rounded to the nearest pence. Once the Rebates for all line items have been calculated, they are aggregated to provide the total Rebate value to be deducted from the Supplier s invoice on early payment of the invoice.

For every 0.25% change in the Bank of England Base Rate the Rebate will be adjusted in the same direction as the Base Rate change, by 0.02%.

The Council shall issue a debit note indicating the value of the Rebate that has been applied